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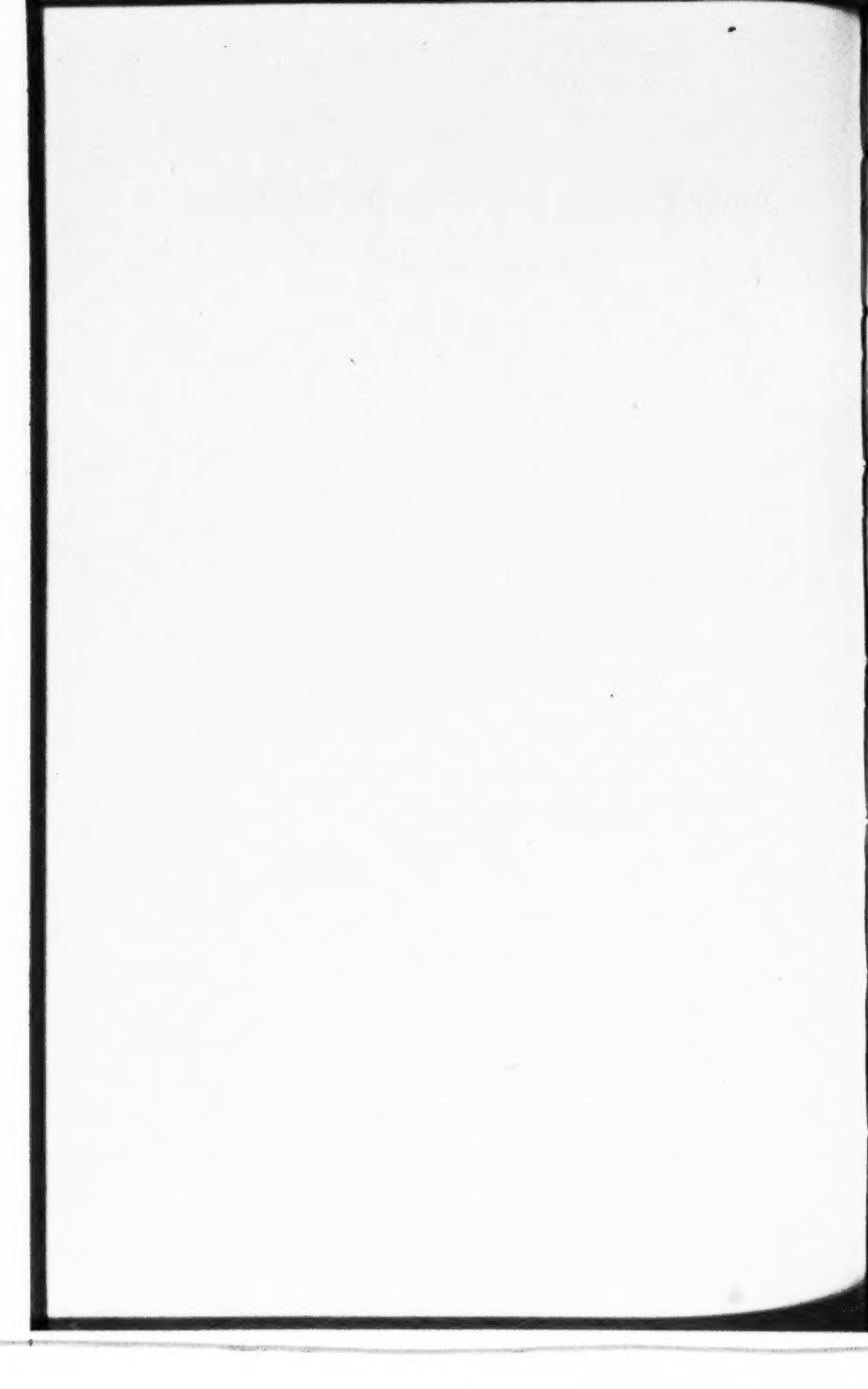
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 516

JOHN ROSSELLI, PETITIONER

v.

JOSEPH W. SANFORD, WARDEN, UNITED STATES
PENITENTIARY, ATLANTA, GEORGIA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 36-38) is reported at 155 F. 2d 427. The opinion of the district court appears at pages 28 to 30 of the record.

JURISDICTION

The judgment of the circuit court of appeals was entered May 16, 1946 (R. 38), and a petition for rehearing was denied June 18, 1946 (R. 51). The petition for a writ of certiorari was filed September 18, 1946. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner may, in a habeas corpus proceeding after conviction, challenge a ruling of the trial court holding that his plea in bar based on the statute of limitations raised issues of fact to be determined at the trial.

STATUTE INVOLVED

The Act of June 18, 1934, c. 569, 48 Stat. 979 (18 U. S. C. 420a), commonly known as the Anti-Racketeering Act, provides in pertinent part as follows:

SEC. 2. Any person who, in connection with or in relation to any act in any way or in any degree affecting trade or commerce or any article or commodity moving or about to move in trade or commerce—

(a) Obtains or attempts to obtain, by the use of or attempt to use or threat to use force, violence, or coercion, the payment of money or other valuable considerations, or the purchase or rental of property or protective services, not including, however, the payment of wages by a bona-fide employer to a bona-fide employee; or

(b) Obtains the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right; or

(c) Commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate sections (a) or (b); or

(d) Conspires or acts concertedly with any other person or persons to commit any of the foregoing acts; shall, upon conviction thereof, be guilty of a felony and shall be punished by imprisonment from one to ten years or by a fine of \$10,000, or both.

STATEMENT

Petitioner and others were indicted in the United States District Court for the Southern District of New York in one count charging conspiracy under the Anti-Racketeering Act of June 18, 1934, *supra*. In conformity to the statute, the indictment did not allege any overt acts but charged a continuing conspiracy from June 18, 1934, to the date the indictment was returned (R. 7), i. e., March 18, 1943 (R. 3). Petitioner's codefendants interposed a special plea in bar, in which petitioner was later deemed to have joined (R. 19-21), in which they asserted that the prosecution had not been commenced within three years after the commission of any act in furtherance of the alleged conspiracy, and hence that it was barred by the statute of limitations (R. 11-13). The Government demurred to the plea on the ground that it was "not a proper plea under the

law" (R. 13-14). In an opinion sustaining the demurrer, the trial court stated that an allegation of an overt act was not necessary in a charge of conspiracy under the Anti-Racketeering Act, and that the issue of fact as to whether an act in furtherance of the conspiracy had actually been committed within the period of limitations could not be appropriately determined in advance of the trial (R. 15-18).

Petitioner was tried, convicted, and sentenced to imprisonment for ten years and to pay a fine of \$10,000 (R. 6). On appeal to the Circuit Court of Appeals for the Second Circuit, the judgment of conviction was affirmed, the court stating in its opinion that there was ample evidence to show that the conspiracy continued into the period of limitations. *United States v. Compagna*, 146 F. 2d 524, 527. This Court denied petitions for writs of certiorari, 324 U. S. 867.

In August 1945, petitioner, who is confined in the federal penitentiary at Atlanta, filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia, in which he alleged that it affirmatively appeared from the face of the record that the offense charged in the indictment was barred by the statute of limitations, and hence that the trial court was without jurisdiction (R. 2-5). The writ issued (R. 21), and respondent filed a return

in which he pointed out that the issue of limitations had already been determined adversely to petitioner by the trial court and the circuit court of appeals (R. 22-25). The district court discharged the writ and remanded petitioner to the custody of the respondent (R. 28-30). On appeal, the judgment was affirmed (R. 38).

ARGUMENT

Petitioner argues (Pet. 7-23) that, by demurring to his plea in bar in the trial court, the government admitted the allegation in the plea that no act in furtherance of the conspiracy had been performed within the three-year period preceding the return of the indictment, and hence that it admitted that the plea was good. This is the basis of his contention that lack of jurisdiction appears on the face of the record. It is clear, however, that the demurrer to the plea in bar placed in issue only its legal sufficiency. The trial court, in accordance with the rule laid down by this Court in *Kissel v. United States*, 218 U. S. 601, 610, and *United States v. Murdock*, 284 U. S. 141, 151, held that a plea in bar was not the proper method of raising the issue of fact which petitioner and his codefendants sought to raise. That issue was determined against petitioner at the trial and cannot now be reviewed on habeas corpus. *Capone v. Aderhold*, 65 F. 2d 130; 71 F. 2d 160 (C. C. A. 5).

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1946.